85-66

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE STATE OF FLORIDA,

vs.

CARLOS LUIS ARANGO, a/k/a
LUIS CARLOS ARANGO,

Respondent.

On Petition for a Writ of Certiorari

to the Supreme Court of Florida

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

I

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II

WHETHER, ASSUMING THE DEFENDANT'S REQUEST IS SPECIFIC UNDER UNITED STATES v. AGURS, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), THE DEFENDANT SHOWED SUFFICIENT PREJUDICE TO WARRANT GRANTING A NEW TRIAL WHERE THE DEFENDANT DID NOT SHOW THAT THE PHYSICAL EVIDENCE IN QUESTION, A GUN, WAS CONNECTED TO THE HOMICIDE IN QUESTION?

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I

OPINIONS BELOW

The opinion of the Supreme Court of Florida on Respondent's direct appeal from the judgments and sentences imposed by the trial court is reported as Arango v. State, 411 So.2d 172 (Fla. 1982) (A.1-17).[1] The opinion of the Supreme Court of Florida remanding the case to the trial court for the purpose of conducting a hearing on the claimed violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) is reported as Arango v. State, 437 So.2d 1099 (Fla. 1983) (A.118-145).

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[1]The symbol "A" is used to designate the appendix to this brief.

The opinion of the Supreme Court of Florida reversing the trial court's denial of Respondent's amended motion for post-conviction relief is reported as Arango v. State, 467 So.2d 692 (Fla. 1985) (A. 146-158).

II

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Rule 17 (b) and (c) of the Rules of the Supreme Court and 28 U.S.C. §1257(3). The opinion of the Supreme Court of Florida was filed on January 31, 1985. (A.146-158). A timely filed Motion for Rehearing and/or Clarification was denied on May 13, 1985 (A.179-180).

III

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The applicable provisions of the Fourteenth Amendment to the United States Constitution read as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV

STATEMENT OF THE CASE

The respondent, Carlos Luis Arango, a/k/a Luis Carlos Arango (hereinafter referred to as "the defendant") was convicted of murder in the first degree and possession of a controlled substance. He was sentenced to death pursuant to the murder conviction. (A.1-17).

The homicide in question took place in March of 1980. The Dade County police received a telephone call from the manager of a Miami apartment complex, who reported a disturbance. Upon arrival of the police, the manager reported that subsequent to telephoning he had heard what he thought was the sound of glass breaking. The police went upstairs and knocked on

the defendant's door. A neighbor then motioned to them that some kind of activity was occurring at the other end of the apartment. Passing the front window, the officers observed cracked glass on the walkway and what appeared to be a bullet hole in the window. They knocked several times, and after receiving no response, entered through the unlocked kitchen door. Once inside, they found and detained the defendant. A search of the bedroom was then conducted. On the bed lay the body of the deceased who had an electrical cord wrapped around his neck, multiple lacerations on his face and two gunshot wounds to his head. Seized from the premises in Defendant's possession were cocaine, pistols and

$7,800 in cash and other items. (A.4).

On January 21, 1982, the Supreme Court of Florida filed an opinion affirming Defendant's convictions and sentences. Rehearing was denied on April 8, 1982. Arango v. State, 411 So.2d 172 (Fla. 1982), cert. denied, __U.S.__, 102 S.Ct. 2973 (1982) (A.1-17). The defendant subsequently petitioned the Supreme Court of Florida for a writ of habeas corpus on the ground that he was denied effective assistance of counsel on direct appeal and for a stay of execution. He also appealed from the trial court's denial of his motion for post-conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. He also sought extraordinary relief based on violation

of international law and alleged violations of Brady v. Maryland, 373 U.S. 83 (1963). On September 1, 1983, the Supreme Court of Florida denied the petition for writ of habeas corpus based on ineffective assistance of counsel and the application for extraordinary relief based on violation of international law, affirmed the denial of the rule 3.850 motion and remanded the case for a hearing on the Brady violation. Arango v. State, 437 So.2d 1099 (Fla. 1983) (A.118-145).

Among the requests made by defendant in a pre-trial discovery motion (A.110-114) was the following request:

> 3. Any physical evidence or witness statements which corroborate the Defendant's statement to the Detective Diaz

> that other Latin males entered the apartmend and committed the homicide.

A hearing as to Defendant's allegations of a Brady violation based upon the above-noted request was held in the trial court, upon remand from the Supreme Court of Florida, and pursuant to Defendant's amended motion for post-conviction relief as to this issue.

Defendant argued that the State of Florida withheld exculpatory evidence supporting his theory of defense that he and the victim were overpowered by three armed Latin males who murdered the victim and then escaped, one of them jumping off the bedroom balcony. This story was testified to by Defendant at his trial and he claimed to have

made these statements to Detective Nieves (not Diaz). Defendant claimed that a pistol was found under the balcony of his apartment on the day following the crime and that it was turned over to the police investigating the murder (A. 147-148).

The State argued that the pistol was not disclosed because it was unrelated to this case. The parties stipulated that the matter could be determined upon a review of the entire record with the addition of deposition testimony and accompanying exhibits. Detective Young, the lead homicide investigator stated in deposition testimony that she did not at the time of discovery of the gun or at the time of her deposition testimony believe

that the gun was involved in the instant homicide (A.148-149).

The trial court denied Defendant's amended motion for post-conviction relief (A.115-117), and he appealed to the Supreme Court of Florida. On January 31, 1985, the Supreme Court of Florida reversed the trial court's ruling and remanded the case to the trial court for a new trial. Arango v. State, 467 So.2d 692 (Fla. 1985)(A.146-158). The State filed a timely Motion for Rehearing and/or Clarification. (A. 159-169). This motion was denied on May 13, 1985 (A. 179-180).

The Florida Supreme Court held that Defendant's request was a specific request for evidence and that he was deprived of a fair trial on the basis

that the outcome of the trial might have been affected (A. 156). This petition for writ of certiorari follows.

V

REASONS FOR GRANTING CERTIORARI

PROPOSITION I

A DEFENDANT'S REQUEST FOR PHYSICAL EVIDENCE OR WITNESS STATEMENTS WHICH CORROBORATE THE DEFENDANT'S STATEMENT TO A [MISNAMED] POLICE OFFICER THAT OTHER LATIN MALES ENTERED THE APARTMENT AND COMMITTED THE HOMICIDE IS A GENERAL REQUEST AS DEFINED IN UNITED STATES V. AGURS, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976), AND SUCH A DECISION OF THE SUPREME COURT OF FLORIDA IS CONTRARY TO AGURS AS WELL AS OPINIONS OF STATE AND FEDERAL COURTS.

The Supreme Court of Florida in its opinion found the request for evidence made by the defendant in the instant case to be specific and vacated the defendant's murder conviction and

sentence of death and remanded the case to the trial court for a new trial. Arango v. State, 467 So.2d 692 (Fla. 1985) (A.146-158). The Court ordered a new trial because it determined that the outcome of the trial might have been affected (A.156-158).

The request in question was for physical evidence or witness statements which corroborate the defendant's statements to a police officer (who was misnamed) that other Latin males entered the apartment and committed the homicide (A.110-114). Respondent submits that the Supreme Court of Florida misapplied United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) in finding that the request in question was specific, as opposed to

general. The request at issue in the instant case states the name of the wrong or a non-existent police officer (Diaz), as part of the request, in lieu of the name of the apparently intended officer (Nieves). Moreover the "omnibus" nature of the request broadened the request and made it general.

The most compelling reasons for granting certiorari in the instant case are two reasons recently noted by Chief Justice Burger in his dissent from the denial of certiorari in Brown v. Chaney, __U.S.__, 105 S.Ct. 601, 605, __L.Ed.2d__ (1984), where it is noted that since Agurs, supra, "courts and prosecutors have struggled to distinguish 'specific' from 'general' requests." The Court went on to reason that part of the problem arises because not all requests fall into obvious "specific" or "general" categories. Justice Burger also noted that, [P]art of the problem arises from a tension inherent in Agurs' formulation: the defense must give the prosecutor notice of what is desired, but notice alone--

such as notice that the defense desires every document in the prosecution's files is not enough to overcome the prosecutor's interest in avoiding premature or excessive discovery." Id.

In the Brown v. Chaney, supra, dissent, specific cases involving the gray area of requests that may not fall precisely within the paradigms for specific and general requests were discussed. It was noted that some courts have found "specific" only those requests that give notice "of the defendant's interest in a particular piece of evidence." Commonwealth v. Jackson, 388 Mass. 98, 110, 445 N.E.2d 1033, 1040 (1983). Likewise, requests or statements of all persons who have been interviewed by the State but who are not expected to be called as

witnesses have been found not to be "specific" in Thompson v. Missouri, 724 F.2d 1314 (8th Cir. 1984). In United States ex rel. Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977), the United States Court of Appeals for the Seventh Circuit found that a request for written statements taken from any witnesses subsequent to the murder is "general." Id. at 105 S.Ct. 605. The Brown v. Chaney dissent further stated that the Court of Appeal's holdings in Chaney v. Brown, 730 F.2d 1344 (10th Cir. 1984) conflicted sharply with the above-noted body of cases.

Although this Court chose not to address the instant question by denying certiorari in Brown v. Chaney, supra, the problems pointed out by the

dissenting opinion have not been solved. Other courts have continued to struggle to decide whether requests fall within "specific" or "general" categories. In Jenrette v. State, 744 F.2d 817, 824, 825 (D.C. Cir. 1984), the United States Court of Appeals for the District of Columbia Circuit acknowledged disagreement as to whether the requested undisclosed information was specifically requested. In Cantone v. Superintendent New York Correctional Facility at Green Haven, 759 F.2d 207 (2nd Cir. 1985), the state took great issue with the determination that the request in question was specific. Certiorari should therefore be granted in the instant case because this case and other recent decisions demonstrate that it

is important to clarify this Court's decision in United States v. Agurs, supra, and that conflicts continue to be created. This case is significant because it is clear that application of the proper test would have achieved a totally different result.

PROPOSITION II

ASSUMING THAT THE DEFENDANT'S REQUEST IS SPECIFIC UNDER UNITED STATES v. AGURS, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), THE DEFENDANT DID NOT SHOW SUFFICIENT PREJUDICE TO WARRANT GRANTING OF A NEW TRIAL WHERE THE DEFENDANT DID NOT SHOW THAT THE PHYSICAL EVIDENCE IN QUESTION, A GUN, WAS CONNECTED TO THE HOMICIDE IN QUESTION.

Even if the request in question in the instant case is viewed as "specific", the decision of the Supreme Court of Florida misinterprets the language of Agurs, supra, as to specific requests. Moreover, it is implicit in Chief Justice Burger's dissent in Brown v. Chaney, supra, at 105 S.Ct. 604, 605 that Agurs, was not determinative of the "specific" (second) category, but that Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194,

10 L.Ed.2d 215 (1963) addressed the question of requests for specific evidence (not specific requests for general evidence). The "standard" for category two situations was not enumerated.

In addition, the Supreme Court of Florida misinterpreted the context of the Brady holding. The Supreme Court of Florida's opinion in the instant case states that under the Brady type situation the judgment must be set aside if "the suppressed evidence might have affected the outcome of the trial." The Brady analysis was not limited to a stringent standard. The true pronouncements of Brady were not that reversal of a judgment or sentence automatically should result if the evidence was of such a materiality that might have

affected the outcome of the trial, but rather whether said materiality existed and if so, it violated due process standards. Due process analysis requires the showing of a likelihood of prejudice. See, United States v. Valenzuela-Bernal, __U.S.__, 102 S.Ct. 3440, __L.Ed.2d.__ (1980).

Thus, the proper analysis is whether the evidence in question, an unidentified gun found on the grounds of a common apartment building, where Defendant's apartment, the scene of the homicide, was located was so material as to deprive Defendant of due process in that there is a reasonable likelihood that it could have affected the jury. See, e.g.. United States v. Valenzuela-Bernal, supra, at __U.S.__, 102 S.Ct.

3450, n.10. In the instant case, the gun in question was only tied in to the instant case by speculation. Defendant did not demonstrate the requisite amount of prejudice, rising to the level of a deprivation of due process. Defendant never asserted during the course of the trial that a gun or other object was dropped from the balcony. He presented his theory to the jury that other individuals with guns were present. Thus, the "supressed" evidence in this case does not rise to the level envisioned by this Court in either Brady or Valenzuela-Bernal, as a due process violation.

Thus, certiorari should be granted in this case, as the analysis followed by the Supreme Court of Florida is a

a misinterpretation of the provisions of the due process clause of the Fourteenth Amendment to the United States Constitution and has done so in a manner contrary to prior decisions of this Court.[2]

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[2]The decision below is also clearly contrary to the provisions of the very recent decision of this Court, United States v. Bagley, ___U.S.___ (1985) (Case No. 84-48; Opinion filed July 2, 1985) [37 Cr.L. 3185]

VI
CONCLUSION

This Court is therefore urged to accept this case to resolve the conflict concerning the instant issues of compelling national importance.

RESPECTFULLY SUBMITTED on this _____day of July, 1985, at Tallahassee, Florida.

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NO.

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October Term, 1984

THE STATE OF FLORIDA,

vs.

CARLOS LUIS ARANGO, a/k/a
LUIS CARLOS ARANGO,

Respondent.

On Petition for a Writ of Certiorari

to the Supreme Court of Florida

APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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I N D E X

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A. 1

Luis Carlos ARANGO, Appellant,

v.

STATE of Florida, Appellee.

No. 59678.

Supreme Court of Florida.

Jan. 21, 1982.

Rehearing Denied April 8, 1982.

Affirmed.

McDonald, J., concurred in part, dissented in part, and filed opinion in which Boyd, J., joined.

Vincent J. Flynn of Flynn, Rubio & Tarkoff Miami, for appellant.

Jim Smith, Atty. Gen. and Anthony C. Musto and Joel D. Rosenblatt, Asst. Attys. Gen., Miami, for appellee.

PER CURIAM.

Arango appeals his convictions of murder

in the first degree and possession of a controlled substance and his sentence of death. He alleges that the trial court committed four errors. We find, however, that only three issues raise points that warrant discussion at any length.[1] None of the issues raised require a reversal of the trial court's judgment or sentence. Hence, we affirm appellant's convictions and sentence.[2]

---

[1]Arango also contends that a prospective juror was improperly excused for cause. The record, however, clearly reveals that the venireman could not render an impartial decision as to appellant's guilt. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[2]Jurisdiction vests under article V, section 3(b) (1) of the Florida Constitution, and section 921.141(4) of the Florida Statutes (1979).

In March of 1980, the Dade County police received a telephone call from the manager of a Miami apartment complex reporting a disturbance. Upon their arrival, the manager reported that subsequent to telephoning he had heard what he thought was the sound of a glass breaking. The police went upstairs and knocked on appellant's apartment door. A neighbor then motioned to them that some kind of activity was occurring at the other end of the apartment. Passing the front window, the officers observered cracked glass on the walkway and what appeared to be a bullet hole in the window. They knocked several times and, after receiving no response, entered through the unlocked kitchen door. Once inside, they found and detained appellant. A search of the bedroom was

then conducted. On the bed lay the body of the deceased, who had an electrical cord wrapped around his neck, multiple lacerations on his face, and two gunshot wounds to his head. Cocaine, pistols, and $7,800 in cash, among other items were seized from the premises.

The grand jury indicted appellant for first-degree murder and possession of a controlled substance. A motion to suppress evidence allegedly obtained illegally was filed and later denied, the trial judge having determined that the warrantless search was justified under the circumstances.

The jury found appellant guilty of both charges and recommended the death sentence. At the conclusion of the

penalty phase of the proceeding, the trial judge found the existence of one aggravating and one mitigating circumstance and imposed the sentence of death.

Appellant first contends that the trial court erred in denying his motion to suppress evicence allegedly obtained by an illegal search and seizure. He relies on Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), which held that the fourth amendment provides protection against a warrantless entry into a person's home for the purpose of making a routine felony arrest. However, the rule in Payton does not apply where there are exigent circumstances. As we have made clear in our decisions, the need to protect life and to prevent serious

bodily injury provides justification for an otherwise invalid entry. This exception governs here.

As we recently held in Zeigler v. State, 402 So.2d 365 (Fla. 1981), the police may enter a dwelling without a warrant if they have credible information that a person's life may be in danger. In this case, the police acted under the reasonable belief that a person was either dead or dying inside appellant's apartment. The telephone call and subsequent report from the manager, the cracked glass and bullet hole, and the neighbor's indication of a commotion were sufficient indicia of an emergency situation. Accordingly, no warrant was required, and the motion to dismiss was properly denied.

Appellant next maintains that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof. At one point in the trial proceeding, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) and State v. Dixon, 283 So.2d 1 (Fla. 1973) cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

In Mullaney the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In Dixon we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that the state must establish them.

In the present case, the jury instruction, if given alone, may have conflicted with the principles of law

enucniated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Appellant also argues that the trial court erred in imposing the death penalty. One aggravating circumstance was found applicable here: the homicide was considered "especially heinous, atrocious, or cruel." §921.141(6) (a),

Fla.Stat. (1979). He maintains that unless we are willing to recede from earlier capital cases construing this statute, his sentence of death is disproportionate punishment. Citing to Halliwell v. State, 323 So.2d 557 (Fla. 1975), Swain v. State, 322 So.2d 485 (Fla. 1975), and Taylor v. State, 294 So.2d 648 (Fla. 1974), he claims that we are compelled to reduce his sentence from death to life imprisonment.

Looking at the facts present here, we see that the cases cited by appellant are clearly distinguishable. In the instant case, the trial judge found that appellant beat the victim with a blunt instrument many times about the head and body. Deep cuts were made on the face, causing severe hemorrhaging.

The wire used in a TV remote control device was wrapped aroung the victim's neck, choking him. A large towel stuffed into the victim's mouth prevented his breathing. After beating and strangling him, appellant shot the victim twice in the head.

Halliwell, on the other hand, involved a love triangle in which the appellant mutilated the body of the deceased several hours after the murder was completed. We reduced Halliwell's sentence from death to life imprisonment, holding that such conduct was not the kind contemplated by the legislature in providing for the consideration of aggravating circumstances. In the present case, the record shows that the beatings occurred prior to the

murder, precisely the same factor we held in Halliwell was "revelant in fixing the death penalty." 323 So.2d 561.

Swan is also different because there the trial judge overrode the jury's recommendation of life imprisonment. As we have often stated, such a decision must be based on clear and convincing facts that the death penalty is appropriate. Tedder v. State, 322 So.2d 908 (Fla. 1975). The state introduced no evidence showing why Swan should be electrocuted, and the record did not demonstrate facts sufficient to satisfy Tedder.

Taylor, like Swan, involved a trial judge's rejection of a jury's

recommendation of a life sentence. We reversed the sentence of death, finding that a multiplicity of factors could have influenced the jury to be lenient, including the possibility that the appellant was not the "triggerman" in the murder for which he was charged. In the case before us the jury, in view of only one mitigating circumstances, recommended death. The trial judge, after considering the totality of circumstances and exercising his reasoned judgment, adopted the jury's advisory sentence.

As we said in Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978), cert. denied, 444 (1979), the death penalty statute does not contemplate "a mere tabulation

of aggravating versus mitigating circumstances to arrive at a net sum." Instead it places upon the trial judge the task of weighing all these factors. We believe that the trial court properly performed this function.

For the reasons expressed, we affirm the convictions and sentence.

It is so ordered.

SUNDBERG, C.J., and ADKINS, OVERTON, and ALDERMAN, JJ., concur.

McDonald, J., concurs in part and dissents in part with an opinion, in which BOYD, J., concurs.

McDONALD, Justice, concurring in part/ dissenting in part.

While I concur that there was no trial error, that there was sufficient evidence to sustain the conviction, and that it was the jury's function to believe or disbelieve the defendant, I do not believe that this homicide justifies the death penalty. The trial judge predicates the imposition of the death penalty on the single aggravating factor that the crime was especially heinous, atrocious and cruel. The facts of this case do not support that finding, as we have defined it in State v. Dixon, 283 So.2d 1 (Fla. 1973), beyond a reasonable doubt. Even if they did, that single aggravating factor should not, in this case, warrant

the death penalty. The defendant, a Colombian, has no past criminal record, but was a user of drugs. The deceased, also a Colombian and a friend of the appellant, was a dealer in drugs from whom the defendant had previously purchased drugs. While there is a suspicion that the parties may have been involved in a drug transaction, no one knows why this homicide was committed. Nevertheless, the circumstances sufficient to impose the death penalty. I would reduce the sentence to life imprisonment.

BOYD, Justice, concurs:

I concur in the majority opinion affirming guilt, but I concur with

Justice McDonald opinion that life imprisonment and not death is the appropriate penalty.

IN THE CIRCUIT COURT
OF THE 11th JUDICIAL
CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO: 80-5372

STATE OF FLORIDA,)

Plaintiff,)

vs.)

CARLOS LUIS ARANGO,)
a/k/a LUIS CARLOS
ARANGO,)

Defendant.)

_____)

AMENDED MOTION FOR POST CONVICTION RELIEF

Defendant, CARLOS LUIS ARANGO a/k/a LUIS CARLOS ARANGO, through undersigned counsel, moves for post-conviction relief, pursuant to Fla.R.Crim.P. 3.850, from his conviction for murder in the

first degree and sentence of death. In support of this motion, defendant alleges the following:

1. The Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida entered the judgment of conviction and sentence under attack.

2. Defendant was adjudicated guilty on July 17, 1980 and a jury rendered an advisory sentence on the same date. On July 18, 1980, the Court sentenced the Defendant to death by electrocution as to the first count of the indictment for murder. On July 28, 1980, the judgment of conviction and sentence of imprisonment for five years was imposed as to Count II of the indictment, the

sentence to run concurrently with the sentence imposed in Count I. On that same date, the Court entered its formal sentencing order as to the first-degree murder count of the indictment.

3. Defendant was sentenced to death by electrocution.

4. Defendant was indicted for (1) murder in the first degree; and (2) possession of cocaine.

5. Defendant entered a plea of not guilty to both counts.

6. Defendant was tried by a jury.

7. Defendant testified at the guilt phase of his trial.

8. Defendant appealed from the judgment of conviction and sentence.

9. Defendant's conviction and sentence were affirmed by the Supreme Court of Florida on January 21, 1982 and rehearing was denied on April 8, 1982. Arango v. State, 411 So.2d 172 (Fla. 1982).

10. Defendant filed a petition for writ of certiorari in the Supreme Court of the United States seeking review of the decision of the Supreme Court of Florida on direct appeal. Certiorari was denied on June 21, 1982. Arango v. Florida, __U.S.__ 102 S.Ct. 2973,73 L.Ed.2d 1360 (1982).

11. On December 1, 1982, trial counsel for Mr. Arango appeared before the Board of Executive Clemency. On April 6, 1983, the Governor denied Mr. Arango's plea for clemency by signing a warrant for his death by electrocution to take place during the week of April 29, 1983. The execution was scheduled for May 3, 1983 at 7:00 a.m.

12. In addition to the above described direct appeal proceedings, the following proceedings were previously

filed in this court with respect to Mr. Arango's judgment of conviction and sentence.

(a) On January 3, 1983, Mr. Arango filed a motion for Post-Conviction

Relief pursuant to Fla.R.Crim.P. 3.850; later a supplement and amendment thereto were filed. In conjunction therewith, Mr. Arango also filed a Motion for Stay of Execution, Motion to Declare Insolvency, Motion for Appointment of and Payment of Translators, Experts, Investigators, and Counsel; Motion for Evidentiary Hearing; Motion for Continuance of Evidentiary Hearing; and Request to Compel the State to Conduct Fingerpring Comparisons.

(b) Eleven grounds were raised in the Motion including: (1) Ineffective assistance of trial counsel; (2) Failure of the state to preserve an exculpatory yellow shirt; (3) Inappropriate behavior of a juror during trial; 4) violation of the doctrine of

Witherspoon in the excusal of a juror; (5) Refusal to allow newspaper clippings into evidence at the sentencing phase; (6) Introduction of prejudicial evidence at the sentencing phase; (7) Inpermissably shifting the burden of proving mitigating circumstances at the sentencing phase; (8) Death qualified jury also determined sentence; (9) Failure of the indictment to list each element of the offense charged; (10) Death penalty statute is unconstitutional on its face and as applied; (11) Defendant was penalized for rejecting a plea offer of life imprisonment.

(c) On April 21, 1983, this Court conducted a hearing on the substantive issues in the Motion for Post-Conviction Relief, and upon Mr. Arango's

Motion for Evidentiary Hearing on the issue of ineffective assistance of counsel. On that same date, without an evidentary hearing, this court entered orders denying Mr. Arango's Motion for Post-Conviction Relief and all of Mr. Arango's other Motions except to declare him indigent for purposes of costs on appeal.

13. In addition to the above collateral proceedings in this court, Mr. Arango filed the following proceedings in the Florida Supreme Court.

(a) On April 21, 1983, Mr. Arango timely filed a Notice of Appeal to the Florida Supreme Court from this Court's order of April 21, 1983, denying his Motion for Post-Conviction Relief. He

also filed a Motion for Stay Pending Appeal, Request for Expedited Briefing Schedule, and Request for Oral Argument.

(b) On April 25, 1983, Mr. Arango filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court on the grounds that he was denied effective appellate counsel.

(c) On April 29, 1983, Mr. Arango filed an Application for Extraordinary Relief to Remedy Violations of Brady v. Maryland, 373 U.S. 83 (1963) and International Law; and Motion for Stay of Execution. The Brady violation involved favorable evidence of a third gun which the prosecution withheld from Mr. Arango at the time of trial, which evidence was discovered three years

after the trial by the private investigator hired by undersigned counsel. The investigator reported this finding to counsel just several days subsequent to the April 21, 1983 hearing in this court.

(d) The Florida Supreme Court consolidated the above three causes of action, (1) the Appeal from the Order denying the Motion for Post-Conviction Relief; (2) the Petition for Writ of Habeas Corpus; and (3) the Application for Extraordinary Relief to Remedy Violations of Brady v. Maryland and International Law. Oral argument was held on May 2, 1983. On that same date, the Florida Supreme Court entered an Order staying the execution of Mr. Arango pending further order of that

Court.

(e) Mr. Arango subsequently filed a Petition for Error Coram Nobis in the Florida Supreme Court setting forth that, subsequent to oral argument, some third person wrote a letter to the Honorable Robert Deehl confessing that he had committed the murder for which Mr. Arango had been convicted.

(f) The Florida Supreme Court rendered an opinion on September 1, 1983, Arango v. State, Case Nos. 63,562 and 63,563, 8 FLW 316 (Fla. 1983):

(1) Affirming the Order denying the Motion for Post-Conviction Relief;

(2) Denying the Petition for Writ of Habeas Corpus;

(3) Granting the application for Extraordinary Relief on the grounds that Mr. Arango had made a prima facie showing of a Brady v. Maryland violation by showing that the State of Florida discovered a third gun under Mr. Arango's apartment balcony one day after Mr. Posada's death, but that the prosecution failed to disclose this favorable evidence to trial counsel despite a specific request for such discovery. The Florida Supreme Court remanded the cause to this court for "the purpose of conducting an evidentiary hearing on the claimed Brady violation." The mandate of the Florida Supreme Court issued on September 26, 1983.

Therefore, the within Amended Motion for Post-Conviction Relief is presented to this court for resolution of this matter.

(g) On October 10, 1983, The Supreme Court entered an order without opinion denying Mr. Arango's Petition for Error Coram Nobis regarding the confession letter which had been sent to Judge Deehl.

14. In addition to the above proceedings in the Florida Supreme court, Mr. Arango filed the following proceedings in the Federal Courts:

(a) During the pendency of his direct appeal to the Supreme Court of Florida, Defendant, along with numerous

other death sentenced appellants, filed an Application for Extraordinary Relief and Petition for writ of Habeas corpus in the Supreme Court of Florida challenging the court's practice of reviewing ex parte, non-record information concerning Defendant's and other capital appellants' mental health status and personal backgrounds. The Supreme Court of Florida denied relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the Supreme Court of the United States declined to review that decision by writ of certiorari, Brown v. Wainwright, __U.S.__, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

(b) On April 27, 1983, Mr. Arango filed a Petition for Writ of Habeas Corpus in the United States District

Court for the Southern District of Florida. The only issues raised in that petition were those which had previously been exhausted in state court in Mr. Arango's direct appeal and the Brown proceedings. On April 30, 1983, the Honorable Eugene Spellman held a hearing including an evidentiary hearing on the Brown issue. On May 2, 1983, the United States District Court entered an Order denying the Petition for Writ of Habeas Corpus subject to the filing of the Findings of Fact and Conclusions of Law. On May 6, 1983, the court entered its final Order denying said petition. On June 9, 1983, the District Court granted Mr. Arango's Application for Certificate of Probable Cause to Appeal.

(c) Mr. Arango timely appealed to

the United States Court of Appeals, Eleventh Circuit, from the federal district court's Order denying his petition for Writ of Habeas Corpus. The federal appellate court, sua sponte, expedited appellate proceedings. All briefs were filed in that proceeding.

(d) After reviewing the Florida Supreme Court's opinion of September 1, 1983, and the Status Reports filed by the parties, the Federal court of Appeals, on September 23, 1983, entered an opinion, without oral argument, vacating the district court's Order and remanding the proceedings to the District Court with instructions to stay all proceedings until Mr. Arango had fully exhausted his state court proceedings regarding the Brady violation in regard

to the third gun. The Eleventh Circuit Court of Appeals ordered that within ten days following exhaustion of state remedies regarding the third gun issue, Mr. Arango must file a notice dismissing the federal action as moot or proceed.

15. Mr. Arango was represented by the following counsel:

a) at his original tria and sentencings, by Vincent Flynn, 1414 Coral Way, Coral Gables, Flrida 33135;

b) at his appeal to the Supreme Court of Florida, by Vincent Flynn as appointed by the court;

c) on his petition for writ

of certiorari in the United States Supreme Court, by Vincent Flynn;

d) in clemency proceedings before the Executive Clemency Board, by Vincent Flynn as appointed by the court;

e) in the Brown proceedings before the Supreme Court of Florida and the United States, by counsel designated as lead counsel for the class of petitioners, Marvin E. Frankel, Esq., 300 Park Avenue, New York, New York 10022, and Samuel S. Jacobson, Esq., Suite 2902, Independent Square, Jacksonville, Florida 32202.

f) in all other proceedings by the law firm of Chaykin, Karlan & Jacobs, Sharon B. Jacobs and/or Steven E. Chaykin,

114 Giralda Avenue, Coral Gables,
Florida 33134.

FACTS AND LEGAL GROUNDS UPON WHICH MR. ARANGO'S CONVICTION AND/OR DEATH SENTENCE MUST BE VACATED

I. THE STATE FAILED TO DISCLOSE MATERIAL EVIDENCE THAT THE POLICE HAD DISCOVERED A THIRD GUN UNDER MR. ARANGO'S BALCONY ONE DAY AFTER THE MURDER.

16. At the time of his arrest, Mr. Arango told the police officers that he was innocent and that three males murdered Mr. Posada, then at least one escaped from his apartment by jumping off the bedroom balcony (T. 369-370, 384). Based only upon circumstantial evidence and because no evidence could be presented at the time of trial to corroborate Mr. Arango's version of the

facts, a jury found Mr. Arango guilty of first-degree murder. The Court followed this same jury's recommendation that Mr. Arango be sentenced to death.

17. Subsequent to this Court's entry of an order denying Mr. Arango's Motion for Post-Conviction Relief dated April 21, 1983, private investigator, Mr. Tom D'Azevedo of Intercontinental Detective Agency, reported to undersigned counsel that he discovered the existence of a third gun found at the crime scene which the State failed to disclose to Mr. Arango's trial counsel and which would have corroborated Mr. Arango's version of the facts. A review of the depositions, files and records in conjunction with Mr. D'Azevedo's report reveals that the

State withheld this crucial exculpatory evidence in the following manner.

18. A child, who was and still is a resident of Mr. Arango's apartment complex, discovered a fully loaded, semi-automatic, pistol while playing underneath Mr. Arango's bedroom balcony one day after Mr. Arango's arrest. The gun was lying in a cocked position. The child brought the gun to his father's attention, who immediately notified the police.

19. A police officer took possession of the gun, placed it in an evidence bag and notified Detective Deborah Young of the child's discovery of the

gun, its location and when it was found.[1] Detective Young was the lead homocide investigator assigned to the above captioned case. (T. 25, 34, 99). A copy of the incident report filed by the police officer is attached hereto as Exhibit A, and made a part hereof by reference.

20. The incident report specifically states that the gun's discovery was "referred to homicide" and 'assigned to Detective Young" (Exhibit A). In addition, the laboratory analysis

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[1] On information and belief the same child who discovered the semi-automatic pistol returned to the area under the balcony after the police officer took possession of the gun. He then discovered a casing lying within a foot of where the gun had been found. It was reported to the police. The same police

request of the weapon describes the investigator as Detective Young and notes: that the gun was "possibly involved in a homicide at 5525 S.W. 77th Court, Case No. 97865-A. This is the location of and case number assigned to the investigation of Mr. Posada's murder. A copy of the laboratory analysis request is attached hereto as Exhibit B and incorporated herein by reference.

21. Detective Young instructed the police officer to forward the gun to ballistics for analysis and testing. One week later on April 4, 1980, Detective Young notified the finder of the pistol that it was not going to be involved in the Arango homicide

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officer returned and took possession of the casing.

investigation and it could be returned to him after the six month statutory waiting period.

22. The property receipt filed by the police officer indicates that Assistant State Attorney Roy Kahn, who was assigned to the homicide investigation in Mr. Arango's case and who prosecuted Mr. Arango at trial, was also notified of the discovered weapon.[2] A copy of the property receipt is attached hereto as Exhibit C and incorporated herein by reference. Neither

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[2] On information and belief, the state lost the entire contents of the original file of the State Attorney's office on or about the time that Mr. Arango filed his Motion for Extraordinary Relief to remedy the violation of Brady v. Maryland in the Florida Supreme Court regarding this undisclosed third gun.

Mr. Arango nor his trial counsel, Vincent Flynn, Esq., was notified by the State of the gun's existence at that time or any subsequent time. See the Affidavit of Vincent J. Flynn, Esq., attached hereto as Exhibit E and incorporated herein by reference.

23. Trial counsel filed not only a general request for reciprocal disclosure of favorable evidence, but also filed a specific request. On April 30, 1980, Mr. Arango's Motion for Production of Favorable Evidence was granted by the court. (R. 67-68A). That motion specifically requested, inter alia:

> 3. Any physical evidence or witness statements to Detective Diaz which corroborate the Defendant's

> statements that other Latin males entered the apartment and committed the homicide.

24. The State failed to comply with the above order by withholding all evidence pertaining to the discovery and location of the gun beneath Mr. Arango's balcony. Indeed, Detective Young's deposition of June 11, 1980 reveals that the state was still withholding all information surrounding the existence of the third gun two months after defense counsel's specific request. A copy of Detective Young's deposition is attached as Exhibit D, incorporated by reference, and will be hereinafter referred to as "Depo." Assistant State Attorney Roy Kahn appeared on behalf of the State at the deposition.

25. Although Detective Young was repeatedly asked by defense counsel to describe her involvement with the investigation of this case, she never mentioned or referred in any way to the discovery of the third weapon, the results of any ballistics test, or her conversation with a potential witness, the father whose son found the gun, whom she had previously informed of the results of that ballistics test. (Depo. 14, 15, 17, 19, 20, 25).

26. Detective Young was specifically asked whether any evidence was

taken other than from the apartment,to which she replied "only the Defendant's blood" (Depo. p. 14). A week later, on or about the time she called the father

of the child who found the gun, she stated in deposition that her only involvement with the case consisted of 1) a meeting with the Assistant State Attorney assigned to the case, Mr. Roy Kahn, regarding a warrant for Mr. Arango's blood and 2) checking the status of the lab work. (Depo. 17).

27. Again, when she was finally asked "if she had done anything else concerning any involvement in this case" she flatly stated "no more than going before the grand jury." (Depo 20).

28. Detective Young or Assistant State Attorney, Roy Kahn, failed to reveal to Mr. Arango's trial counsel the existence of this third gun, found in a cocked and loaded position, under the

bedroom balcony, which would have corroborated Mr. Arango's version of the facts despite their knowledge of Mr. Arango's statements concerning the three intruders that only two guns were located in the apartment that at least one of the intruders could have escaped through the balcony, and that approximately twenty-eight (28) unidentified latent prints of value were found in the apartment which did not belong to either Mr. Arango or the deceased. (Depo.9, 25-26).

26. Indeed, Detective Young's deposition and the Exhibits indicate quite clearly that the State was attempting to identify the intruders based on Mr. Arango's description (Depo.19), had attempted to trace and cross-reference the two weapons found in the apartment (Depo. 9, 19 25-26) and, in fact, did

attempt to cross-reference the third gun. (See Property Receipt attached as Exhibit C). Furthermore, the State maintained possession of the third gun until (October, 1980, three months after the trial.[3]

30. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme court held that:

> The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

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[3] It is noteworthy that the state did not call Detective Young as a witness at trial even though she was the lead investigator and that only one of four of her investigative reports was made available to defense counsel.

> A prosecution that withholds evidence on demand of an accused, which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. [emphasis added.]

Id at 87-8.

31. The Supreme Court, in a subsequent case summarized the standard to be applied in cases similar to the instant case:

> A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

United States v. Agurs, 427 U.S. 97, 104 (1976).

The Court further stated:

> In Brady the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever excusable. [Emphasis added].

Id at 106.

32. The State's failure to disclose the discovery of the pistol, the witnesses who could testify regarding the gun, and three of the detectives reports

regardless of whether it was deliberate, violated Defendant's right to due process of law guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution.

33. The cocked and loaded undisclosed gun found below the bedroom balcony was favorable and material because it clearly indicates the following:

a) The gun had been ready to use;

b) The gun had been disposed of quickly;

c) The gun's position, when found, precludes the possibility that it was thrown over the balcony from inside the bedroom;

d) The gun's position corroborates Mr. Arango's statements that at least one of the intruders exited over the

balcony.

35. If the jury had known that a third gun was found lying under the bedroom balcony, especially in the manner which indicates that its carrier jumped off the balcony, a reasonable doubt would have been established as to whether Mr. Arango had been alone in the apartment. A reasonable jury could therefore have acquitted Mr. Arango or convicted him of a lesser crime, for example, murder in the second degree.

36. If defense counsel had been promptly advised of the third gun, numerous tests would have been performed which might have further corroborated Mr. Arango's testimony and even led to the arrest of at least one of the

murderers. Mr. Arango was therefore deprived of the opportunity to perform such tests, and was further deprived of the ability to present such evidence in the state's possession regarding his defense. See Affidavit attached as Exhibit E.

37. At the very least, the undisclosed third gun mught have affected the outcome of the punishment imposed. The court found that only one aggravating circumstance applied in this case, that is, that the offense was especially henious, atrocious or cruel. Since Mr. Arango asserted his innocence throughout not only the guilt phase, but also during the sentencing hearing, only two statutory mitigating circumstances could apply. The court found as a

mitigating circumstance that Mr. Arango had no record of any prior criminal activity.[4]

38. Moreover, since Mr. Arango is a Colombian national who had lived in the United States for less than one year, any nonstatutory mitigating witnesses or evidence would have had to have been flown from Colombia. As a result, very little, if any, nonstatutory mitigating evidence was presented to the advisory sentencing jury.

39. The recommended punishment might have been affected if the advisory

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[4]The only other possible statutory mitigating circumstance, that is, the Defendant's age, was precluded from application here because Mr. Arango was in his forties.

sentencing jury had been informed of the existence and circumstances of the third gun, which was convincing evidence that three armed men had been in the apartment at the time of the murder, just as Mr. Arango had testified. The jury could have concluded that Mr. Arango was not primarily responsible for the actions which caused Mr. Posada's demise. Since only one aggravating circumstance applied, this undisclosed favorable material evidence would have weighed heavily in mitigation against the death penalty.

40. If trial counsel had been advised of the third gun in response to his specific request for such favorable evidence, he would have conducted the trial and sentencing in a different

manner, which might have affected the outcome. See the Affidavit of Vincent J. Flynn, Esq., attached hereto as Exhibit E.

WHEREFORE, and by reason of the foregoing, Luis Carlos Arango, prays that this Honorable Court grant all relief to which he may be entitled in this proceeding, including but not limited to the following:

A. Issue an Order scheduling an evidentiary hearing at which argument and evidence may be offered concerning the allegations of the foregoing Motion, at which hearing Mr. arango is allowed to be present;

B. Issue an Order vacating and

setting aside Mr. Arango's judgment of conviction and/or sentence of death;

c. Issue such other and further Orders as this court deems just and proper.

Respectfully submitted,

CHAYKIN, KARLIN & JACOBS
Attorneys for Luis Carlos Arango
114 Giralda Avenue
Coral Gables, Florida 33134
Telephone: (305) 446-1220

By: /s/
SHARON B. JACOBS

and

/s/
STEVEN E. CHAYKIN

VERIFICATION OF MOTION FOR POST-CONVICTION RELIEF

STATE OF FLORIDA)
) ss.
COUNTY OF BRADFORD)

BEFORE ME, the undersigned authority, this day personally appeared LUIS CARLOS ARANGO, who, being first duly sworn, deposes and says: that the foregoing has been translated to him and that the allegations and statements contained in the Amended Motion for Post-Conviction Relief are

true and correct to the best of his knowledge.

CARLOS LUIS ARANGO

SWORN TO and SUBSCRIBED
before me this __day of
October, 1983.

Notary Public
State of Florida at Large

My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Application was provided by United States mail to: Sam Rabin, Assistant State Attorney, Office of the State Attorney, 1351 N.W. 12th Street, Metro-Justice Building, Room 600, Miami, Florida, 33125 this ____day of October, 1983.

BY: _____
SHARON B. JACOBS

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY

THE STATE OF FLORIDA

VS. #8005372

CARLOS LUIS ARANGO
aka LUIS CARLOS ARANGO
Defendant

AMENDED ORDER DENYING MOTION
FOR RELIEF PURSUANT TO RCrP-3.850

THIS CAUSE HAVING COME ON BEFORE the Court upon the Motion of the above prisoner for relief pursuant to RULE 3.850, Criminal Procedure, and the Court having examined the said Motion and finding that the allegations contained therein do not constitute legal grounds for granting a New Trial or release of the prisoner, and the Motion being insufficient in substance to support the relief prayed, it is

thereupon, CONSIDERED ORDERED AND ADJUDGED that the Motion for Relief pursuant to RULE 3.850, Criminal Procedure, filed by the above prisoner be, and the same is hereby DENIED.

The movant is advised that he has the right to appeal within thirty days of the rendition of this order and is further advised that he may file a Motion for rehearing within fifteen days of the date of service of this order.

DONE AND ORDERED in Open Court at Miami, Dade county, Florida, this 29th day of NOVEMBER, A.D., 1983.

s/s
ROBERT M. DEEHL FOR Judge
ARTHUR I. SNYDER

I CERTIFY that copy hereof has been furnished to the movant, CARLOS LUIS ARANGO aka LUIS CARLOS ARANGO, by mail this 2 day of December, 19 83.

RICHARD P. BRINKER, Clerk

By: s/s
Deputy Clerk

CIR/CT/CRI 62 Rev. 5/83

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY
FLORIDA.

CRIMINAL DIVISION

CASE NO. 80-5372

STATE OF FLORIDA,)

Plaintiff,)

vs.)

CARLOS LUIS ARANGO,
a/k/a LUIS CARLOS
ARANGO,)

Defendant.)

_____)

AMENDED MOTION FOR POST-CONVICTION RELIEF RE: BRADY VIOLATION

Defendant, CARLOS LUIS ARANGO a/k/a LUIS CARLOS ARANGO, through undersigned counsel, moves for post-conviction relief, pursuant to Fla.R.Crim.P. 3.850

from his conviction for murder in the first degree and sentence of death. In support of this motion, defendant alleges the following:

1. The Circuit Court of the Eleventh Judicial circuit in and for Dade County, Florida entered the judgment of conviction and sentence under attack.

2. Defendant was adjudicated guilty on July 17, 1980 and a jury rendered an advisory sentence on that same date. On July 18, 1980, the Court sentenced the Defendant to death by electrocution as to the first count of the indictment for murder. On July 28, 1980, the judgment of conviction and sentence of imprisonment for five

years was imposed as to Count II of the indictment, the sentence to run concurrently with the sentence imposed in Count I. On that same date, the Court entered its formal sentencing order as to the first-degree murder count of the indictment.

3. Defendant was sentenced to death by electrocution.

4. Defendant was indicted for (1) murder in the first degree; and (2) possession of cocaine.

5. Defendant entered a plea of not guilty to both counts.

6. Defendant was tried by jury.

7. Defendant testified at the guilt phase of his trial.

8. Defendant appealed from the judgment of conviction and sentence.

9. Defendant's conviction and sentence were affirmed by the Supreme Court of Florida on January 21, 1982 and rehearing was denied on April 8, 1982. Arango v. State, 411 So.2d 172 (Fla. 1982) (Justices McDonald and Boyd concurring as to guilt, but dissenting as to the imposition of the death sentence).

10. Defendant filed a petition for writ of certiorari in the Supreme Court of the United States seeking review of the decision of the Supreme Court of

Florida on direct appeal. Certiorari was denied on June 21, 1982. Arango v. Florida, __U.S.__ 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982).

11. On December 1, 1982, trial counsel for Mr. Arango appeared before the board of Executive Clemency. On April 6, 1983, the Governor denied Mr. Arango's plea for clemency by signing a warrant for his death by electrocution to take place during the week of April 29, 1983. The execution was scheduled for May 3, 1983 at 7:00 a.m.

12. In addition to the above described direct appeal proceedings, the following proceedings were previously filed in this court with respect to Mr. Arango's judgment of conviction and

sentence.

(a) On January 3, 1983, Mr. Arango filed a Motion for Post-Conviction Relief pursuant to Fla.R.Crim.P. 3.850; later a supplement and amendment thereto were filed. In conjunction therewith, Mr. Arango also filed a Motion for Stay of Execution, Motion to Declare Insolvency, Motion for Appointment of and Payment of Translators, Experts, Investigators, and Counsel; Motion for Evidentiary Hearing; Motion for Continuance of Evidentiary Hearing; and Request to Compel the state to Conduct Fingerprint Comparisons.

(b) Eleven grounds were raised in the Motion including; (1) Ineffective assistance of trial counsel;

(2) Failure of the state to preserve an exculpatory yellow shirt; (3) Inappropriate behavior of a juror during trial; (4) Violation of the doctrine of Witherspoon in the excusal of a juror; (5) Refusal to allow newspaper clippings into evidence at the sentencing phase; (6) Introduction of prejudicial evidence at the sentencing phase; (7) Inpermissably shifting the burden of proving mitigating circumstances at the sentencing phase; (8) Death qualified jury also determined sentence; (9) Failure of the indictment to list each element of the offense charged; (10) Death penalty statute is unconstitutuional on its face and as applied; (11) Defendant was penalized for rejecting a plea offer of life imprisonment.

(c) On April 21, 1983, this court conducted a hearing on the substantive issues in the Motion for Post-Conviction Relief, and upon Mr. Arango's Motion for Evidentiary Hearing on the issue of ineffective assistance of counsel. On that same date, without an evidentiary hearing, this court entered orders denying Mr. Arango's Motion for Post-Conviction Relief and all of Mr. Arango's other Motions except to declare him indigent for purposes of costs on appeal.

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(a) On April 21, 1983, Mr. Arango timely filed a Notice of Appeal to the

Florida Supreme Court from this court's order of April 21, 1983, denying his Motion for Post-Conviction Relief. He also filed a Motion for Stay Pending Appeal, Request for Expedited Briefing Schedule, and Request for Oral Argument.

(b) On April 25, 1983, Mr. Arango filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court on the grounds that he was denied effective appellate counsel.

(c) On April 29, 1983, Mr. Arango filed an Application for Extraordinary Relief ot Remedy Violations of Brady v. Maryland, 373 U.S. 83 (1963) and Internaitonal Law; and Motion for Stay of Execution. The Brady violation involved favorable evidence of a third

gun which the prosecution withheld from Mr. Arango at the time of trial, which evidence was discovered three years after the trial by the private investigator hired by undersigned counsel. The investigator reported this finding to counsel just several days subsequent to the April 21, 1983 hearing in this court.

(d) The Florida Supreme Court consolidated the above three causes of action, (1) the Appeal from the Order denying the Motion for Post-Conviction Relief; (2) the Petition for Writ of Habeas corpus; and (3) the Application for Extraordinary Relief to Remedy violations of Brady v. Maryland and International Law. Oral argument was held on May 2, 1983. On that same date, the

Florida Supreme Court entered an Order staying the execution of Mr. Arango pending further order of that Court.

(e) Mr. Arango subsequently filed a Petition for Error Coram Nobis in the Florida Supreme Court setting forth that, subsequent to oral argument, some third person wrote a letter to the Honorable Robert Deehl confessing that he had committed the murder for which Mr. Arango had been convicted.

(f) The Florida Supreme Court rendered an opinion on September 1, 1983, Arango v. State, Case Nos. 63,562 and 63,563, 437 So.2d 1099.[1]

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[1] Justices McDonald and Overton concurred in part, but dissented as to the denial of a hearing on ineffective

(1) Affirming the Order denying the Motion for Post-Conviction Relief;

(2) Denying the Petition for Writ of Habeas Corpus;

(3) Granting the Application for Extraordinary Relief on the grounds that Mr. Arango had made a prima facie showing of a Brady v. Maryland violation by showing that the State of Florida discovered a third gun under Mr. Arangos apartment balcony one day after Mr. Posada's death, but that the prosecution failed to disclose this favorable evidence to trial counsel depsite a specific request for such discovery. The Florida Supreme Court remanded the cause to this court for the "purpose of conducting a hearing on the claimed Brady

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assistance of counsel at the sentencing phase, on the grounds that this is not

violation." The mandate of the Florida Supreme Court issued on September 26, 1983. Therefore, the within Amended Motion for Post-Conviction Relief is presented to this court for resolution of this matter.

(g) On October 10, 1983, The Supreme Court entered an order without opinion denying Mr. Arango's Petition for Error Coram Nobis regarding the confession letter which had been sent to Judge Deehl.

14. In addition to the above proceedings in the Florida Supreme Court, Mr. Arango filed the following proceedings in the Federal courts:

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a proper death case.

(a) During the pendency of his direct appeal to the Supreme Court of Florida, Defendant, along with numerous other death sentenced appellants, filed an Application for Extraordinary Relief and Petition for Writ of Habeas Corpus in the Supreme Court of Florida challenging that court's practice of reviewing ex parte, non-record information concerning Defendant's and other capital appellants' mental health status and personal back rounds. The Supreme Court of Florida denied relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the Supreme Court of the United States declined to review that decision by writ of certiorari, Brown v. Waingright, __U.S.__, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

(b) On April 27, 1983, Mr. Arango filed a Petition for Writ for Habeas Corpus in the United States District Court for the Southern District of Florida. The only issues raised in that petition were those which had previously been exhausted in state court in Mr. Arango's direct appeal and the Brown proceedings. On April 30, 1983, the Honorable Eugene Spellman held a hearing, including an evidentiary hearing on the Brown issue. On May 2, 1983, the United States District Court entered an Order denying the Petition for Writ of Habeas Corpus subject to the filing of the Findings of Fact and Conclusions of Law. On May 6, 1983, the court entered its final order denying said petition. On June 9, 1983, the District Court granted Mr. Arango's

Application for Certificate of Probable Cause to Appeal.

(c) Mr. Arango timely appealed to the United States Court of Appeals, Eleventh Circuit, from the federal district court's order denying his petition for writ of Habeas Corpus. The federal appellate court, sua sponte, expedited appellate proceedings. All briefs were filed in that proceeding.

(d) After reviewing the Florida Supreme Court's opinion of September 1, 1983, and Status Reports filed by the parties, the Federal court of Appeals, on September 23, 1983, entered an opinion, without oral argument, vacating the district court's Order and remanding the proceedings

to the District court with instructions to stay all proceedings until Mr. Arango had fully exhausted his state court proceedings regarding the Brady violation in regard to the undisclosed third gun. The Eleventh Circuit Court of Appeals ordered that within ten days following exhaustion of state remedies regarding the thrid gun issue, Mr. Arango must file a notice dismissing the federal action as moot or proceed. The state has filed a petition for re-hearing en banc.

15. Mr. Arango was represented by the following counsel:

a) at his original trial and sentencings, by Vincent Flynn, 1414 Coral Way, Coral Gables, Florida 33135;

b) at his appeal to the

Supreme Court of Florida, by Vincent Flynn as appointed by the Court;

C) on his petition for writ of certiorari in the United Supreme Court, by Vincent Flynn;

d) in clemency proceedings before the Executive Clemency Board, by Vincent Flynn as apponnted by the court;

e) in the Brown proceedings before the Supreme Courts of Florida and the United States, by counsel designated as lead counsel for the class of petitioners, Marvin E. Frankel, Esq., 300 Park Avenue, New York, New York 10022, and Samuel S. Jacobson, Esq., Suite 2902, Independent Square, Jacksonville, Florida 32202.

f) in all other proceedings by the law firm of Chaykin, Karlan & Jacobson, Sharon B. Jacobs and/or

Steven E. Chaykin, 114 Giralda Avenue, Coral Gables, Florida 33134.

FACTS AND LEGAL GROUNDS UPON WHICH MR. ARANGO'S CONVICTION AND/OR DEATH SENTENCE MUST BE VACATED

I. THE STATE FAILED TO DISCLOSE MATERIAL EVIDENCE THAT THE POLICE HAD DISCOVERED A THIRD GUN UNDER MR. ARANGO'S BALCONY ONE DAY AFTER THE MURDER.

16, At the time of his arrest, Mr. Arango told the police officers that he was innocent and that three males, each armed with guns, murdered Mr. Posada, then at least one escaped from his apartment by jumping off the bedroom balcony (T. 369-370, 384). Based only upon circumstantial evidence and because no evidence could be presented at the time of trial to corroborate Mr.

Arango's version of the facts, a jury found Mr. Arango guilty of first-degree murder. The court followed the same jury's recommendation that Mr. Arango be sentenced to death.

17. Subsequent to this court's entry of an order denying Mr. Arango's Motion for Post-Conviction Relief dated April 21, 1983, private investigator, Mr. Tom D'Azevedo of Intercontinental Detective Agency, reported to undersigned counsel that he discovered that a third gun had been found at the crime scene under the apartment balcony which the State failed to disclose to Mr. Arango's trial counsel and which would have corroborated Mr. Arango's version of the facts. A reivew of the depositions, files and records in conjunc-

tion with Mr. D'Azevedo's report reveals that the State withheld this crucial favorable evidence in the following manner.

18. A child, who was and still is a resident of Mr. Arango's apartment complex, discovered a fully loaded, semi-automatic, pistol while playing underneath Mr. Arango's bedroom balcony one day after Mr. Arango's arrest. The gun was lying in a cocked position. The child brought the gun to his father's attention, who immediately notified the police.

19. A police officer (Officer Lake) took possession of the gun, placed it in an evidence bag and notified Detective Deborah Young of the

child's discovery of the gun, its location and when it was found.[2] Detective Young was the lead homicide investigator assigned to the above captioned case. (T. 25, 34, 99). A copy of the incident report filed by the police officer is attached hereto as Exhibit A, and made a part hereof by reference.

20. The incident report specifically states that the gun's discovery was "referred to homicide" and "assigned to Detective Young" (Exhibit A). In addition, the laboratory analysis request of the weapon describes the investigator as Detective Young and notes:

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[2]On information and belief the same child who discovered the semi-automatic pistol returned to the area under the

that the gun was "possibly involved in a homicide at 5525 S.W. 77th Court, Case No. 97865-A. This is the location of and case number assigned to the investigation of Mr. Posada's murder. A copy of the laboratory analysis request is attached hereto as Exhibit B and incorporated herein by reference.

21. Detective Young instructed the police officer to forward the gun to ballistics for analysis and testing. One week later on April 4, 1980, Detective Young notified the finder of the pistol that it was not going to be involved in the Arango homicide investigation and it could be returned tc him

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balcony after the police officer took possession of the gun. He then discovered a casing lying within a foot of where

after the six month statutory waiting period. The gun was subsequently returned to the finder.

22. The police property receipt contains a notation made technician Kennington that Assistant State Attorney Roy Kahn was assigned to the homicide investigation in Mr. Arango's case and prosecuted Mr. Arango at trial.[3] A copy of the property receipt is attached

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the gun had been found. It was reported to the police. The same police officer returned and took possession of the casing.

[3]The State lost the entire contents of the original file of the State Attorney's office, therefore Defendant is precluded from discovering any records of the matter. Technician Kennington has no recollection of discussing the third gun with the assistant state attorney. (See deposition of Technician Kennington 11/9/83, cont'd 11/16/83.) Roy Kahn, esq., testified on

as Exhibit C and incorporated herein by reference. Neither Mr. Arango nor his trial counsel, Vincent Flynn, Esq., was notified by the state of the gun's existence atthat time or any subsequent time. See the affidavit of Vincent J. Flynn, Esq., attached hereto as Exhibit E and incorporated herein by reference.

23. Technician Kennington testified in deposition that the state's records contain no results of any tests which may have been performed on this third gun. The only document in his file representing a lab report is for tests conducted on a similar pistol but

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deposition that he was not advised of the existence of the third gun and would have disclosed same to defense counsel if he had had knowledge.

containing a different serial number. The report contains a case number for a case filed three months subsequent to the dates that this "third gun" was examined by Mr. Kennington, however the date of the report is backdated to March 31, 1980. This lab report provides no information on the third gun cross-referenced to the Arango case. (See Deposition of Technician Kennington, 11/9/83, cont'd 11/16/83.) Defendant is therefore permanently deprived of the opportunity to utilize the results of standard tests in his defense.

24. Trial counsel filed not only a general request for reciprocal disclosure of favorable evidence, but also filed a specific request. On April 30, 1980, Mr. Arango's Motion for Production

evidence was granted by the court (R. 67-68A). That motion specifically requested, inter alia (See Motion for Production attached as Exhibit F):

> 3. Any physical evidence or witness statements to Detective Diaz which corroborate the Defendant's statements that other Latin males entered the apartment and commited the homicide.

25. The State failed to comply with the above order by withholding all evidence pertaining to the discovery and location of the gun and casing beneath Mr. Arango's balcony and the name of the person to whom it was registered. Indeed, Detective Young's deposition of June 11, 1980 reveals that the state was still withholding all information surrounding the existence of the third gun two months after defense counsel's

specific request. A copy of Detective Young's deposition is attached as Exhibit D, incorporated by reference, and will be hereinafter referred to as "Depo." Assistant State Attorney Roy Kahn appeared on behalf of the State at the deposition.

26. Although Detective Young was repeatedly asked by defense counsel to describe her involvement with the investigation of this case, she never mentioned or referred in any way to the discovery of the third weapon, the results of any ballistics test, or her conversation with a potential witness, the father whose son found the gun, whom she had previously informed of the results of that ballistics test (Depo. 14, 15, 17, 19, 20, 25). Nor did she

advise defendant that the state had traced the ownership to a named individual.

27. Detective Young was specifically asked whether any evidence was taken other than from the apartment, to which she replied "only the Defendant's blood" (Depo. p.14). A week later, on or about the time she called the father of the child who found the gun, she stated in deposition that her only involvement with the case consisted of 1) a meeting with the Assistant State Attorney assigned to the case, Mr. Roy Kahn, regarding a warrant for Mr. Arango's blood and 2) checking the status of the lab work. (Depo. 17).

28. Again, when she was finally asked "if she had done anything else concerning any involvement in this case" she flatly stated "no more than going before the grand jury." (Depo 20).

29. The state in the person of the lead homicide detective made a conscious decision to withhold from Mr. Arango's trial counsel the information of this third gun, found in a cocked and loaded position, under the bedroom balcony, which would have corroborated Mr. Arango's version of the facts, despite knowledge of Mr. Arango's statements concerning the three armed intruders, that only two guns were located in the apartment that at least one of the intruders could have escaped through the balcony, and that approximately

twenty-eight (28) unidentified latent prints of value were found in the apartment which did not belong to either Mr. Arango or the deceased. (Depo. 9, 25-26).

30. Indeed, Detective Young's deposition and the Exhibits indicate quite clearly that the State was attempting to identify the intruders based on Mr. Arango's decription (Depo. 19), had attempted to trace and cross-reference the two weapons found in the apartment (Depo. 9, 19 25-26) and, in fact, did attempt to cross-reference the thrid gun. (See Property Receipt attached as Exhibit C). Furthermore, the State maintained possession of the third gun until (October, 1980, three months

after the trial.[4]

31. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that:

> The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> * * *
>
> A prosecution that withholds evidence on demand of an accused, which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the

[4] It is noteworthy that the state did not call Detective young as a witness at trial even though she was the lead investigator and that only one out of four of her investigative reports was made available to defense counsel.

> prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. [Emphasis added.]

Id at 87-8.

32. Brady's progeny set forth the standard to be applied in cases similar to the instant case:

> A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

United States v. Agurs, 427 U.S. 97, 104 (1976).

The Court further stated:

> In Brady the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course,

> no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. [Emphasis added.]

Id at 106.

In addition, knowledge on the part of the prosecutor is not required if the police fail to disclose the favorable evidence:

> Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence.

Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. "The cruelest lies are often told in silence." If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging.

The duty to disclose is that of the state, which

> ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on the account excused...

Barbee v. warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964); Accord, Giglio v. United States, 405 U.S. 150 (1971).

33. The State's failure to disclose the discovery of the pistol, the witnesses who could testify regarding the gun, and three of the detectives reports, and the results of the ownership trace, regardless of whether it was deliberate, violated Defendant's right to due process of law and a fair trial guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution

34. The cocked and loaded undisclosed third gun found below the bedroom balcony was favorable and material because it clearly indicates the following:

a) The gun had been ready to use;

b) The gun had been disposed of quickly;

c) The gun's position, when found, precludes the possibility that it was thrown over the balcony from inside the bedroom;

d) The gun's position corroborates Mr. Arango's statements that at least one of the intruders exited over the balcony.

35. The third gun might have affected the outcome of the trial. The discovery of the third undisclosed gun, refutes the State's theory that the two guns found at the scene were used by Mr. Arango, one in each hand; and corroborates Mr. Arango's testimony of three armed individuals, one of whom escaped over the balcony.

36. If the jury had known that a third gun was found lying under the bedroom balcony, especially in the manner which indicates that its carrier jumped off the balcony, a reasonable doubt would have been established as to whether Mr. Arango had been alone in the apartment. A reasonable jury could therefore have acquitted Mr. Arango or convicted him of a lesser crime, for

example, murder in the second degree.

37. If defense counsel had been promptly advised of the third gun, and its registered owner, numerous tests would have been performed which might have further corroborated Mr. Arango's testimony and even led to the arrest of at least one of the murderers. Mr. Arango was therefore deprived of the opportunity to perform such tests, and was further deprived of the ability to present such evidence in the state's possession regarding his defense. See Affidavit attached as Exhibit E.

38. At the very least, the undisclosed third gun clearly might have affected the outcome of the punishment imposed. The court found that only one aggravating circumstance applied in

this case, that is, that the offense was especially heinous, atrocious or cruel. Since Mr. Arango asserted his innocence throughout not only the guilt phase, but also during the sentencing hearing, only two statutory mitigating circumstances could apply. The court found as a mitigating circumstance that Mr. Arango had no record of any prior criminal activity.[5]

39. Moreover, since Mr. Arango is a Colombian national who had lived in the United States for less than one

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[5]The only other possible statutory mitigating circumstance, that is, the Defendant's age, was precluded from application here because Mr. Arango was in his forties.

year, any nonstatutory mitigating witnesses or evidence would have had to have been flown from Colombia. As a result, very little, if any, nonstatutory mitigating evidence was presented to the advisory sentencing jury.

40. The recommended punishment might have been affected if the advisory sentencing jury had been informed of the existence and circumstances of the third gun, which was convincing evidence that three armed men had been in the apartment at the time of the murder, just as Mr. Arango had testified. The jury could also have concluded, in the alternative, that Mr. Arango was not primarily responsible for the actions which caused Mr. Posada's demise. Since only one aggravating circumstance

applied, this undisclosed favorable material evidence would have weighed heavily in mitigation against the death penalty.

41. If trial counsel had been advised of the third gun in response to his specific request for such favorable evidence, he would have conducted the trial and sentencing in a different manner, which might have affected the outcome. See the Affidavit of Vincent J. Flynn, Esq., attached hereto as Exhibit E.

WHEREFORE, and by reason of the foregoing, Luis Carlos Arango, prays that this Honorable Court grant all relief to which he may be entitled in this proceeding, including but not

limited to the following:

A. Issue an Order scheduling an evidentiary hearing at which argument and evidence may be offered concerning the allegations of the foregoing Motion, at which hearing Mr. Arango is allowed to be present;

B. Issue and Order vacating and setting aside Mr. Arango's judgment of conviction and/or sentence of death;

C. Issue such other further Orders as this court deems just and proper.

Respectfully submitted,

CHAYKIN, KARLAN & JACOBS
Attorneys for Luis Carlos Arango
114 Giralda Avenue
Coral Gables, Florida 33134
Telephone: (305) 446-1220

By: /s/
SHARON B. JACOBS

By: /s/
STEVEN E. CHAYKIN

VERIFICATION OF MOTION FOR POST-CONVICTION RELIEF

STATE OF FLORIDA)
) ss.
COUNTY OF BRADFORD)

BEFORE ME, the undersigned authority, this day personally appeared LUIS CARLOS ARANGO, who, being first duly sworn, deposes and says: that the foregoing has been translated to him and that the allegations and statements contained in the Amended Motion for Post-Conviction Relief are

true and correct to the best of his knowledge.

/s/
CARLOS LUIS ARANGO

SWORN TO and SUBSCRIBED
before me this 28th day
of November, 1983.

/s/
Notary Public
State of Florida at Large

My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Application (except for the above signature of Mr. Arango) was hand delivered to: Samuel Rabin, Assistant State Attorney, Office of the State Attorney,

1351 N.W. 12th Street, Metro-Justice Building, Room 600, Miami, Florida, 33125 this 23rd day of November, 1983.

By: /s/
SHARON B. JACOBS

A. 110

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA

CRIMINAL DIVISION

CASE NO. 805372 (Gable)

THE STATE OF FLORIDA,)
Plaintiff,)
vs.)
LUIS CARLOS ARANGO,)
Defendant.)
_____)

The Defendant, by and through his undersigned attorney, pursuant to RCrP 3.220(a)(2) and (5) and the Due Process Clause of the Fourteenth Amenement to the United States constitution, moves this Honorable Court to order the State to disclose to the Defendant the

following specifically requested favorable evidence within the possession and custody of the State:

1. Any witness accounts or statements or physical evidence indicating that other persons in addition to the Defendant and the decedent were in the Defendant's apartment at the time of the homicide.

2. Any physical evidence indicating that the Defendant did not fire the murder weapon or that another person did, in fact fire the murder weapon.

3. Any physical evidence or witness statements which corroborate the Defendant's statements to Detective Diaz that other Latin males entered the

apartment and committed the homicide.

4. Any police investigation report made to the police which tends to establish the defendant's innocence or to impeach or contradict the testimony of any witness whom the State will call at the time of the trial of this case.

It is prayed that (1) the Court order the disclosure of the above favorable evidence including any such evidence which is work product but discoverable as favorable evidence under State v. Gillespie, 227 So.2d 530 (1969); (2) Said disclosure be made intially in camera to the Court by the presentation to the Court of the entire State and investigatory agency files so that the

Court and not the state determines what should be disclosed; and (3) the State and investigatory agency files to be preserved and made available for the appellate record so that any erroneous ruling as to favorable evidence ay be properly preserved.

The defense contends that the evidence sought cannot be discovered except by Court Order.

Respectfully submitted,

FLYNN, RUBIO & TARKOFF
1414 Coral Way
Miami, Florida 33145
858-1414

By: /s/
VINCENT J. FLYNN,
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Roy Conn, Assistant State Attorney, 1351 N.W. 12th Street, Miami, Florida this 30th day of April, 1980.

/s/
Vincent J. Flynn

IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY
FLORIDA

CRIMINAL DIVISION

CASE NO. 80-5372

STATE OF FLORIDA,)
Plaintiff,)
vs.)
CARLOS LUIS ARANGO,)
Defendant.)
_____)

ORDER DENYING DEFENDANT'S MOTION FOR POST CONVICTION RELIEF RE: BRADY VIOLATION

THIS CAUSE having come on to be heard upon the Defendant's Amended Motion for Post-Conviction Relief Re: Violation, and this Court having heard argument of counsel and reviewed testimony and depositions of witnesses, reviewed exhibits and taken judicial notice of the requested exhibits,

testimony and records in the Clerk of the court's file, and being otherwise fully advised in the matter,

ORDERS AND ADJUDES that the Defendant's Amended Motion for Post-Conviction Relief Re: Brady Violation is hereby denied pursuant to the statements of fact and statements of law set forth in the record of the proceedings held on November 29, 1983.

DONE AND ORDERED in chambers at Miami, Dade County, Florida, on this the __day of December, 1983.

/s/
ROBERT DEEHL
Acting Circuit court Judge
Criminal Division

Copies Furnished To:

Sharon Jacobs
Specially Appointed P blic Defender

Steven Chaykin
Specially Appointed Public Defender

Penny Brill
Assistant Attorney General

Joel Rosenblatt
Assistant State Attorney

Samuel J. Rabin, Jr.
Assistant State Attorney

Carlos Luis ARANGO, Appellant,

v.

The STATE OF Florida, Appellee.

Carlos Luis ARANGO, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
Respondent.

Nos. 63562, 63563

Supreme Court of Florida.

Sept. 1, 1983

Remanded.

McDonald, J., concurred specially and filed opinion in which Overton, J., joined.

Adkins, Boyd, Ehrlich, JJ., concur to portions of opinion denying habeas corpus and affirming denial of the 3.850 motion, but dissent to remanding for hearing on Brady violation.

Sharon B. Jacobs and Steven E. Chaykin of Chaykin, Karlan & Jacobs, Coral Gables, for appellant/petitioner.

Jim Smith, Atty. Gen., and Penny Hershoff Brill and Carolyn M. Snurkowski Asst. Attys. Gen., Miami, for appellee/respondent.

PER CURIAM.

Arango was convicted of first-degree murder and sentenced to death in July, 1980. We affirmed the conviction and sentence on direct appeal. Arango v. State, 411 So.2d 172 (Fla.), cert. denied, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982). Arango petitions for a writ of habeas corpus on the ground that he was denied effective assistance of counsel on direct appeal

and for a stay of his execution pending final disposition of his petition for writ of habeas corpus. By separate application, he petitions for a stay of execution and extraordinary relief to remedy alleged violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and international law. Arango also appeals the denial of his rule 3.350 motion for post-conviction relief. We have jurisdiction. Art. V, § 3(b)(7) & (9), Fla. Const. We deny the petition for writ of habeas corpus based on ineffective assistance of counsel and the application for extraordinary relief based on violation of international law, affirm the denial of the rule 3.850 motion, and remand for a hearing on the Brady violation.

HABEAS CORPUS

Petitioner urges that he received ineffective assistance of counsel on direct appeal and, in support, cites nine issues which his counsel failed to raise on appeal:

1. Denial of Petitioner's motion to dismiss when state failed to preserve and make available physical evidence which would have proven innocence.
2. Denial of petitioner's motions for mistrial and to voir dire a juror because the judge and juror smiled during petitioner's testimony.
3. Refusal of judge to

permit introduction of newspaper clippings in mitigation showing that murder victim was notorious Mafia figure.

4. Improper consideration of a nonstatutory aggravating factor not supported by evidence.

5. Indictment violated sixth amendment and due process clause of the fourteenth amendment by not including aggravating factors to be considered.

6. The Florida death penalty statute, facially and as applied, violates the fifth, sixth, eighth, and fourteenth amendments by failing to channel jury discretion by

permitting irrelevant factors into the sentencing process by jury and judge.

7. The death sentence violated the sixth, eighth, and fourteenth amendments in that incorrect jury instructions were given and correct jury instructions were refused.

8. Imposition of the death sentence after petitioner rejected a plea bargain offer of life imprisonment violated the sixth, eighth, and fourteenth amendments.

9. Petitioner's due process right to a fair and impartial jury was violated in that the jury which recommended the

death penalty was composed of jurors who favored the death penalty and who had already rejected his trial defenses as to guilt and formed an unfair prejudicial mindset. We find that all of petitioner's arguments are without merit and that only points 1 and 4 require discussion.

Petitioner contends that he was denied effective assistance of counsel because his lawyer failed to appeal the trial court's denial of his motion to dismiss based on the state's acknowledged failure to preserve a bloody yellow shirt discovered in petitioner's

apartment following the murder. Petitioner's position is that the loss of the shirt by the state constituted a Brady violation and had the shirt been presented at trial, it would have corroborated petitioner's statement that the shirt had been left behind by one of three assailants who petitioner avers murdered the victim.

A Brady violation is normally predicated on the defendant's not knowing of the the withheld evidence. Where defendant is aware of the evidence before or during trial, the appropriate action is a motion to compel discovery

or a motion to dismiss. Petitioner became aware of the loss of the shirt during trial and moved to dismiss based on its loss. Although there is a possibility that admission of the shirt might have helped the defense, we are not persuaded that failure to raise the issue on appeal constitutes ineffective assistance of counsel. The facts of the case show that the murder occurred in petitioner's apartment, that the shirt was in a bathroom sink, and that there was evidence that petitioner had, at least

partially, changed his clothes and attempted to clean himself prior to the arrival of the police. Under these circumstances, and in view of other evidence that petitioner committed the murder, the trial court's denial of his motion to dismiss predicated upon the state's admitted loss of the shirt is not such that failure to appeal its denial amounts to ineffective counsel.

Petitioner also claims that the trial judge improperly considered a non-statutory aggravating factor

which was not supported by any evidence. The basis for this claim is in the trial judge's finding of fact relative to aggravating circumstances:

> (H) That the murder of which the defendant has been convicted was especially henious, atrocious or cruel. That the record amply shows that the defendant did beat the victim, Jario-Arango Posada, with a blunt instrument many times about his head and body, causing deep lacerations and

tremendous bleeding; that the victim was struck severely between his legs, almost severing his sexual organ; that the defendant placed television remote control wire around the victim's neck choking him and balled up a towel and stuffed it into his throat, blocking his air passages; that after severe beating and strangulation, two gunshot wound were placed in the victim's head. The record

> further shows that the defendant acted in a premeditated, senseless and cruel manner that is indicative of the unreasonable, unlawful and violent nature of this defendant in the especially heinous, atrocious murder of Jario-Arango Posada.

Petitioner urges that the last sentence of the quote is a separate non-statutory aggravating circumstance bearing on petitioner's conduct prior to the murder and that failure to raise this issue on appeal constituted ineffective assistance of counsel. we disagree. The sentence bears on the judge's finding that the murder was

especially heinous, atrocious, or cruel and contains no error. We have previously affirmed the death sentence on direct appeal based on a finding of a single aggravating circumstance, especially heinous, atrocious, or cruel. Arango at 174-75. There was no ineffective assistance of counsel for failure to raise the issue. See Thomas v. State, 421 So.2d 160 (Fla. 1982).

APPEAL (3.850 MOTION)

Appellant urges that the trial court erred in denying his motion: (1) in the face of uncontradicted evidence that the state failed to preserve exculpatory evidence; (2) in view of the thirteen substantive issues raised by appellant; and (3) wihtout an evidentiary hearing or without attaching the

portion of the files and records conclusively showing that appellant was not entitled to relief.

On point one, we have previously noted that the state's failure to preserve the allegedly exculpatory evidence, a bloody yellow shirt, was known to appellant during the course of the trial and that the trial court denied appellant's motion to dismiss based on the state's loss of the evidence.

On point two, the record reflects that all of the thirteen substantive issues raised by appellant were either raised, or could have been raised, on appeal. Thus, neither points one nor two present issues appropriate for rule 3.850 challenges. See Raulerson v. State, 420 So.2d 567 (Fla. 1982).

Point three merits discussion. On January 3, 1983, appellant's counsel filed an unverified motion for post-conviction relief. Said motion was scheduled for hearing on March 9, 1983, but was indefinitely postponed at the request of appellate counsel until she could obtain verification by appellant. The delay in obtaining verification was attributed to a language barrier. (Appellant speaks only Spanish.) On April 6, 1983, the Governor signed a warrant directing that appellant be executed during the week of April 29, 1983. Thereafter, appellant's counsel filed an amendment to the motion for post-conviction relief and ancillary motions seeking a declaration of indigency, appointment and payment of a translator,

experts (attorneys), investigators, and counsel, a stay of the execution, and an evidentiary hearing. Appellant was transported to Dade county and a hearing scheduled for april 21, 1983. On that date, appellant verified his motion for post-conviction relief.

At the rule 3.850 hearing, presided over by the original trial judge, appellant maintained that his ancillary motions should first be granted. The trial judge declined to do so until appellant came forth with preliminary evidence that the claimed ineffective assistance of counsel did not result from tiral strategy and tactics. Despite the presence at court of the former allegedly ineffective, counsel, subpoenaed by the state and contrary to the suggestion of the state and the

court, appellant refused to call former counsel and objected to the state doing so. Appellant's position was that he was not prepared for an "evidentiary" hearing on his motion for post-conviction relief and could not prepare for such hearing unless his ancillary motions were granted. Having reached impasse, the trial judge reviewed the standards for post-conviction relief from Knight v. State, 394 So.2d 997 (Fla. 1981), and ruled that appellant had not supported his motion.

We have reviewed the various points raised by appellant in his motion for post-conviction relief, as amended, and agree with the trial judge that the specific omissions or overt acts are either explainable on their face as

trial tactics or do not otherwise show ineffective assistance of counsel. Appellant met the first prong of the four-part test set forth in Knight by detailing the specific omission or overt act on which his claim was based, but failed entirely "to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel." Id. at 1001.

Appellant is apparently laboring under a misapprehension of his burden under Knight and the purpose of a rule 3.850 hearing. When a motion for post-conviction relief is filed, the presiding judge may: (1) determine that the motion itself is legally insufficient and deny the motion without

a hearing; (2) determine that the files and records in the case conclusively show that the prisoner is entitled to no relief and deny the motion without a hearing, attaching a copy of the portion of the files and records conclusively showing no entitlement to relief; or (3) determine that a hearing is required for disposition of the motion.

In the instant cause appellant was afforded a hearing but complains that it was illusory and unduly restrictive because of the judge's refusal to first grant his ancillary motions. Appellant's counsel refused to put on any preliminary evidence to support either the motion for post-conviction relief or the ancillary motions, despite the fact that both the appellant and the

allegedly ineffective former counsel were present and available. We approve the trial judge's determination that preliminary supporting evidence was necessary before he could realistically consider granting the various ancillary motions. The burden was on the appellant to support his pending motions. We, of course, have no opinion as to what the trial judge might have ruled had appellant or appellant's former counsel been called to testify, but the judge cannot be faulted for appellant counsel's tactical decision not to use the hearing to present probative evidence.

We also take this opportunity to comment on what we consider to be the all too frequent and questionable

practice of waiting until the eleventh hour to raise or prosecute issues which could have and should have been raised months or years before. The unverified motion for post-conviction relief was filed on January 3, 1983. The four-month delay in verifying the motion and scheduling it for hearing until just prior to the scheduled execution week can be described at best as dilatory and, at worst, as an abuse of process. Essentially, appellant appeared at the April 21, 1983, hearing unprepared to carry the Knight burden, demanding instead that he be granted a stay of execution and the appointment of investigators and experts in the speculative expectation that he might be able at some unknown future date to develop evidence to support the motion for

post-conviction relief. We condemn such tactics as unworthy of the legal profession. Spenkelink v. Wainwright, 372 So.2d 927 (Fla. 1979) (Alderman, J., concurring specially).

Appellant also urges that the trial judge erred in failing to attach portions of the files and records conclusively showing that the appellant was entitled to no relief. Such attachment is only required if no hearing is held. Petitioner was granted a hearing. The motion was denied after the hearing at which petitioner failed to either meet prong two, or three, of Knight or to support his ancillary motions for a stay of the execution and additional time and resources. we have reviewed the transcript of the hearing and find

it comports with due process.

APPLICATION FOR EXTRAORDINARY RELIEF

We see no merit in petitioner's argument that imposition of the death penalty on him would violate international law.

At trial, petitioner testified that he and the victim were overpowered by three assailants who murdered the victim and fled prior to the arrival of the police. Petitioner now urges that he has recently discovered, on approximately April 23, 1983, that a semi-automatic pistol was found on the day following the murder under the balcony of petitioner's apartment, and was turned over to the police investigating

the murder. Petitioner urges that this evidence was exculpatory and that the state failed to produce this evidence despite his discovery motion which specifically requested, inter alia:

> 3. Any physical evidence or witness statements which corroborate the Defendant's statements to Detective Diaz that other Latin males entered the apartment and commited the homicide.

The state acknowledges that it did not make petitioner aware of this evidence but maintains that the pistol was unrelated to this case and, thus, was not disclosed. We express no views on the merits but petitioner has made a prima facie case which requires a

hearing. We remand to the trial court for the purpose of conducting a hearing on the claimed Brady violation. Our stay of execution granted on May 2, 1983, remains in effect pending the outcome of the hearing.

It is so ordered.

ALDERMAN, C.J. and SHAW, J., concur.

McDONALD, J., concurs specially with an opinion in which OVERTON, J., concurs.

ADKINS, BOYD and EHRLICH, JJ., concur to portions of opinion denying habeas corpus and affirming denial of the 3.850 motion, but dissent to remanding for a hearing on the Brady violation.

McDONALD, Justice, specially concurring.

I concur in all parts of the opinion except that portion that denies an evidentiary hearing on Arango's 3.850 motion. In addition to the relief afforded Arango in the opinion, he should be authorized to present evidence of ineffective assistance of counsel at the sentencing proceeding. In addition, I would go somewhat further because I also feel that he is entitled to an evidentiary hearing on the effectiveness of counsel at the sentencing proceeding. To me this did not appear to be an appropriate death sentence case, and, had available nonstatutory mitigating circumstances been presented, others may have reached the same conlcusion.

OVERTON, J., concurs.

SUPREME COURT OF FLORIDA

No. 64,721

CARLOS LUIS ARANGO, a/k/a
LUIS CARLOS ARANGO, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[January 31, 1985]

SHAW, J.

Arango, convicted of first-degree murder and sentenced to death, appeals the denial of his amended motion for post-conviction relief, wherein he alleged a discovery violation under Brady v. Maryland, 373 U.S. 83 (1963). Arango previously sought post-conviction relief in this court. Arango v. State, 437 So.2d 1099 (Fla. 1983). He argued

that the state withheld exculpatory evidence supporting his theory of defense that he and the victim were overpowered by three armed Latin males who murdered the victim and then escaped, one of them jumping off the bedroom balcony. Arango had told his story to detective Nieves at the scene and also had given similar testimony at trial, although stating that he did not know if one of the men left by way of the balcony.

Arango argued to this Court that he discovered long after his trial and direct appeal that a semi-automatic pistol was found under the balcony of his apartment the day following the crime and that it was turned over to the police investigating the murder. He further argued that the state

committed a Brady violation in not producing the gun following his discovery requests which included:

> 3. Any physical evidence or witness statements which corroborate the Defendant's statements to Detective Diaz [sic] that other Latin males entered the apartment and committed the homicied.

The state argued that the pistol was not disclosed because it was unrelated to this case. We found that Arango had made a prima facie case requiring a hearing on the claimed Brady violation and remanded to the trial court for that purpose. Id. at 1104-05.

The parties stipulated that the matter could be determined upon a review of the entire record with the addition of deposition testimony and accompanying exhibits. The deposition testimony of Detective Young, the lead

homicide investigator in the case, was that at the time of the investigation she was "relatively new in the section," that she did not and still does not think the pistol, found under Arango's balcony with some casings, was involved in the crime, but that her opinion had changed as to whether she should have informed the prosecutor about the pistol. She testified that she processed the pistol as part of her investigation surrounding the homicide. The gun registration admitted into evidence showed that the pistol was purchased from the Tamiami Gun Shop two days before the murder by one Antonio Garcia. The police could not find the listed address, so they assumed that it did not exist. A computer search turned out more than thirty persons with the

same name. Apparently no further attempt was made to locate the owner.

The prosecutor testified that he would have informed the defense about the pistol had he known of its discovery and proximity to the homicide. The defense attorney testified that production of the gun would have affected his trial strategy.

Although the prosecutor did not personally suppress the evidence, the state may not withhold favorable evidence in the hands of the police, who work closely with the prosecutor. Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969). In Brady the Supreme Court held that "suppression by the prosecuiton of evidence favorable to an accused upon request violates due process where the evidence is material

either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The elements of a Brady violation that deny an accused a fair trial are "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." Moore v. Illinois, 408 U.S. 786, 794-95 (1972).

Present in the instant case is state suppression of evidence favorable to the defense following a defense request for disclosure. Although it may be a coincidence, the fact remains that the gun was recently purchased and located in a place that would support Arango's defense. Our final inquiry is whether the suppressed

exculpatory evidence was material.

The applicable materiality standard depends upon one of three contexts in which the suppression occurred. United States v. Agurs, 427 U.S. 97 (1976). In the first, where the prosecutor has knowingly used perjured testimony, the judgment must be set aside if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. at 103 (footnote omitted). The second situation, as in Brady, is where the defense has made a specific request for the evidence (Brady requested the extrajudicial statements of his accomplice). The judgment must then be set aside if "the suppressed evidence might have affected the outcome of the trial." Id. at 104. In the third situation,

where the request is general ("all Brady material" or "anything exculpatory") or there has been no request at all, the judgment must be set aside if the suppressed evidence "creates a reasonable doubt that did not otherwise exist." Id. at 112. This latter standard is less strict than "demonstrating newly discovered evidence probably would have resulted in acquittal," id. at 111 (footnote omitted), but requires a greater showing than the specific request standard.

There is no issue regarding the prosecutor's knowing use of perjured testimony in the present case. We therefore must determine whether the defense discovery request was general or specific under Agurs, wherein

general requests were characterized as asking for "all Brady material" or "anything exculpatory." We find that the request in the present case is more akin to the Brady request deemed specific in Agurs, as it gave the prosecutor "notice of exactly what the defense required." Moreover, we believe that if there is uncertainty concerning the characterization of a request, the materiality standard applicalbe to specific requests should be used. See Chaney v. Brown, 730 F.2d 1334, 1344 (10th Cir. 1984) (citing King v. Ponte, 717 F.2d 635, 640 (1st Cir. 1983) and United States ex rel. Mazeno v. Gengler, 574 F.2d 730, 736 (3d Cir. 1078)).

The question them becomes whether the defense's access to the evidence of the recently purchased gun's

discovery under the balcony might have affected the outcome of the trial. We make this determination mindful that the goal is "not punishment of society for misdeeds of a prosecutor [or the state] but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when cirminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady, 373 U.S. at 87. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." Agurs, 427 U.S. at 106.

Bearing in mind the foregoing, we find that the state's suppression of the recently purchased gun's discovery, following Arango's specific request for

evidence corroborating his statements that other Latin males entered his apartment and committed the crime, deprived him of a fair trial. We find that the outcome of the trial might have been affected. The prosecutor was able to argue to the jury that "nothing was kept from you, whatever we had is on the table," that Arango's testimony was "not real because it does not jive [sic] with the physical evidence' and, therefore, "does not create a reasonable doubt." We find that due process requires retrial under these circumstances.*

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*If the pistol itself is unavailabe at this late date, defense counsel should be allowed to inform the jury of the discovery and location of the pistol and the fact of its purchase two days before the murder.

We therefore reverse the trial court's denial of post-conviction relief, vacate the sentence of death, and remand to the trial court for a new trial.

It is so ordered.

BOYD, C.J., OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., Concur ADKINS, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

A. 158

An Appeal from the Circuit Court in
in and for Dade County,

Robert M. Deehl, Judge-Case No. 80-5372

Sharon B. Jacobs of Chaykin, Karlan
& Jacobs, Coral Gables, Florida

for Appellant

Jim Smith, Attorney General, and
Calianne P. Lantz, Assistant Attorney
General, Miami, Florida,

for Appellee

A. 159

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,721

CARLOS LUIS ARANGO, a/k/a, Luis Carlos Arango,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING AND/OR CLARIFICATION

APEELLEE, the State of Florida, by and through undersigned counsel hereby moves this Court, pursuant to the provisions of Rule 9.330(a), Florida Rules of appellate Procedure, for clarification and/or rehearing of the opinion filed in the instant cause on January 31, 1985, and as grounds in support thereof states the following:

1. This Court's opinion in the instant case orders reversal of the trial court's denial of Appellant's amended motion for post-conviction relief, vacates the sentence of death and remands the case for a new trial. (See slip opinion, p.5).

2. The literal wording of this Court's opinion does not currently vacate the judgment of conviction for first-degree murder, only the sentence. Appellee therefore respectfully requests that this court clarify its opinion so as to reflect whether the conviction or solely the death sentence are vacated. [In Brady v. Maryland, 373 U.S. 83 (1963), only the Sentence was vacated].

3. Furthermore, Appellant was also convicted and sentenced for possession of the controlled substance, cocaine. (See R.141, original Record on Appeal from direct appeal, Case No. 59,673). He did not challenge said conviction or sentence pursuant to either his amended motion for post-conviction relief or briefs on appeal in this court. appellee therefore requests that this court clarify its opinion so that if a new trial is ordered, it is limited to the first-degree murder charge and that the conviction and sentence for possession of cocaine are not affected by this court's present decision.

4. Appellee further submits that this court has misapprehended the

the nature of the request for evidence in the instant case. The request at issue in this case states the name of the wrong police officer (Diaz), as part of the request, in lieu of the name of the apparently intended officer (Nieves). Moreover, the request was in essence "so specific" in its broad request that it became general. As noted by Chief Justice Burger in his dissent from the denial of certiorari in Brown v. Chaney, __U.S.__, 105 S.Ct. 601, __L.Ed.2d.__ (1984), some courts have found "specific" only those requests that give notice "of the defendant's interest in a particular piece of evidence." Commonwealth v. Jackson, 388 Mass. 98, 110, 445 N.E.2d 1033, 1040 (1983). Likewise, requests for statements of all persons who have

been interviewed by the State but who are not expected to be called as witnesses have been found not to be "specific" in Thompson v. Missouri, 724 F.2d 1314 (8th Cir. 1984). In United States ex rel. Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977), the United States Court of Appeal for the Seventh Circuit found that a request for written statements taken from any witnesses subsequent to the murder is "general."

5. Even if this court should adhere to its determination that the instant request is "specific," the Court has misinterpreted the language of the United States Supreme Court in United States v. Agurs, 427 U.S. 97 (1976), as to "specific" requests. (See p.3, slip opinion). It is implicit in

Chief Justice Burger's dissent in Brown v. Chaney, supra at 105 S.Ct. 604, 605 that Agurs, was not determinative of the "specific" (second) category, but that Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) addressed the question of requests for specific evicence (not specific requests for general evidence). The Chief Justice does not enumerate a "standard" for category two situations.

6. In page three of its opinion, this court has asserted that under the Brady type situation the judgment must be set aside if "the suppressed evidence might have affected the outcome of the trial." The Brady analysis was not limited to a stringent standard. The true pronouncements of Brady were

not that reversal of a judgment or sentence automatically should result if the evidence was of such a materiality that might have affected the outcome of the trial, but rather whether said materiality existed and if so, it violated due process standards. Due process analysis requires the showing of a likelihood of prejudice. See, United States v. Valenzuela-Bernal, __U.S.__, 102 S.Ct. 3440, __L.Ed.2d__ (1980).

7. Thus, the true issue presented in the instant case is whether the evidence in question of the "found" gun was so material as to deprive Appellant of due process and that there is a reasonable likelihood that it could have affected the jury. See, e.g. United States v. Valenzuela-Bernal,

supra, at 102 S.Ct. 3450, n.10. Apellee submits that the questions posed should be answered in the negative when applied in the case sub judice. Appellant did not tie the gun in question to the instant case other than by speculation. He never asserted during the course of the trial that a gun or other object was dropped from the balcony. He presented his theory to the jury that other individuals with guns were present. The "suppressed" evidence in this case does not therefore rise to the lever envisioned by the Supreme court of the United States in either Brady or more recent due process analyses such as in Valenzuela-Bernal, supra. Thus, the trial court's denial of Appellant's motion for post-conviction relief should not be overturned

and Appellant's conviction and sentence for first-degree murder should be affirmed.

8. Appellee further submits that should this Court nonetheless conclude that Appellant's conviction and sentence for first-degree murder should be reversed, the opinion should be further clarified so as not to be interpreted by the trial judge upon retrial, as a directive to automatically admit the gun in question. Appellant should be required to establish in the trial, materiality of the gun to the crime as well as to lay a proper predicate for admission. Appellant should not be placed in any "better" posture than he would have been in had

he actually had knowledge of the "found" gun during the course of his initial tiral and has sought to introduce it.

WHEREFORE, based upon the foregoing reasons and citations of authority, the Appellee respectfully submits that this Court's opinion in the instant case should be clarified as requested herein.

Respectfully submitted,

JIM SMITH
Attorney General

/s/
CALIANNE P. LANTZ
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue
Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR REHEARING AND CLARIFICATION was furnished by mail to SHARON B. JACOBS, Esq., Chaykin, Karlan & Jacobs, 114 Giralda Avenue, Coral Gables, Florida, 33134 on this 14th day of February, 1984.

/s/
CALIANNE P. LANTZ
Assistant Attorney General

/nw

A. 170

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,721

CARLOS LUIS ARANGO
a/k/a, LUIS CARLOS
ARANGO,)

Appellant,)

vs.)

THE STATE OF FLORIDA,)

Appellee.)

_____)

APPELLANT'S RESPONSE TO MOTION FOR REHEARING AND/OR CLARIFICATION

Appellant, LUIS CARLOS ARANGO, through undersigned counsel, urges this Court to deny the appellee's Motion for Rehearing and/or Clarification, and states:

1. Appellee has shown no reason in its Motion for Rehearing and/or

clarification, and states:

1. Appellee has shown now reason in its Motion for Rehearing and/or Clarification for this Court to issue a second opinion.

2. With regard to the Appellee's argument for rehearing, the Motion reargues the merits of the Court's Order and presents the same argument as in its brief. Since the Court questioned both sides during oral argument concerning the state's position regarding whether the request was "specific," it can hardly be said that the Court overlook any facts.

3. Neither did this court overlook any relevant law. The only authority relied upon by the state in its Motion for Rehearing is the

dissenting opinion from the United States Supreme Court's denial of certiorari in Brown v. Chaney, __U.S.__, 105 S.Ct. 601, __L.Ed.2d__ (1984).

4. The fact that the United States Supreme Court denied certiorari in Brown v. Chane strengthens, rather than weakens, Mr. Arango's position and supports this Court's Opinion.[1]

5. With regard to the state's request for clarification, there is no

---

[1]Counsel is mindful that denial of certiorari does not represent precedent by that court on the question of law, however, neither can one dissenting vote regarding the denial of certiorari be cited for any precedential value, as the state claims in its Motion for Rehearing.

reason for misunderstanding this Court's Order. This Court found that "due process requires retrial under these circumstances." (emphasis added.)

> We therefore reverse the trial court's denial of post-conviction relief, vacate the sentence of death, and remand to the trial court for a new trial.
>
> It is so ordered.

(emphasis added.)

6. Since it is obvious that this Court has vacated the conviction for first degree murder and not merely the sentence of death, there is no need for clarification on that point.

7. Finally, there is no need for clarification regarding the introduction of evidence. There is no language in this court's Order which could be

interpreted as absolving defense counsel from laying a proper predicate before introducing any evidence, nor will Mr. Arango "be placed in any better posture than he would have been in had he actually had knowledge of the found gun during the course of his initial trial and had sought to introduce it," as suggested by Appellee's Motion.

8. This Court's Opinion filed January 31, 1985,is a clearly worded outline of the law pertaining to the elements of a Brady violation. The facts of this case and testimony below are accurately described and applied to the law in this Court's opinion.

WHEREFORE, and by reason of the foregoing, Appellant, Luis Carlos Arango, through undersigned counsel,

respectfully requests this Honorable Court to enter an Order denying Appellee's Motion for Rehearing and/or Clarification.

CHAYKIN, KARLAN & JACOBS
Attorneys for Appellant
114 Giralda Avenue
Coral Gables, Florida 33134
(305) 446-1220

By /s/
SHARON B. JACOBS, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of February, 1985, to Calianne Lantz, Esq., Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida 33128.

By /s/
SHARON B. JACOBS, ESQ.

IN THE SUPREME COURT OF FLORIDA
CASE NO. 64,721

LUIS CARLOS ARANGO, a/k/a CARLOS LUIS ARANGO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION FOR REHEARING AND/OR CLARIFICATION

Appellee, the State of Florida, by and through undersigned counsel, hereby files this Notice of Supplemental Authority in Support of Motion for Rehearing and/or Clarification, pursuant to Fla.R.App.P. 9.210(g), directing this Court's attention to the following decision:

United States v. Lehman, 756 F.2d 725, 729 n.2 (9th Cir. 1985), [See also 756 F.2d 730 (Farris, J. concurring in part and dissenting in part)].

Respectfully submitted,

JIM SMITH
Attorney General

/s/
CALIANNE P. LANTZ
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue
Suite 820
Miami, Florida 33128
(305) 377-5441

dm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NOTICE OF SUPPLEMENTAL AUTHORITY was furnished by mail to SHARON B. JACOBS, ESQ., Chaykin, Karlan & Jacobs, 114 Giralda Avenue, Coral Gables, Florida 33134 on this 3d day of May 1985.

/s/
CALIANNE P. LANTZ
Assistant Attorney General

dm

SUPREME COURT OF FLORIDA
Monday, May 13, 1985

CASE NO. 64,721

Circuit Court
Case No. 80-5372
(Dade County)

CARLOS LUIS ARANGO,
a/k/a, LUIS CARLOS
ARANGO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

The Motion For Rehearing And/Or Clarification filed by Appellee and Response thereto, are hereby denied

A. 180

A True Copy

Test:

Sid J. White
Clerk Supreme

By: /s/
Deputy Clerk

JB

cc: Hon. Richard P. Brinker, Clerk
Hon. Gerald T. Wetherington, Chief Judge